

APPEAL NO. 042108-s
FILED OCTOBER 20, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on July 26, 2004, with the record closing on August 6, 2004. The hearing officer resolved the disputed issue by determining that the respondent's (claimant) correct impairment rating (IR) is 23% pursuant to the amended certification of the Texas Workers' Compensation Commission (Commission)-appointed designated doctor. The appellant (carrier) appealed, arguing that the hearing officer's IR determination is incorrect as a matter of law. The appeal file does not contain a response from the claimant.

DECISION

Affirmed.

The claimant failed to appear at the CCH in this matter. At the close of the CCH, the hearing officer sent the claimant a 10-day letter to which no response was received. The hearing officer subsequently issued the decision and order now under review. It is undisputed that the claimant sustained a compensable injury on _____, and as a result of the compensable injury she underwent an L3-4, L4-5 decompressive laminectomy with posterolateral interbody fusion L4 through S1, with pedicle screw fixation L3 to S2. The claimant reached maximum medical improvement (MMI) on August 22, 2002.

On November 22, 2002, the designated doctor certified that under the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides) the claimant had an 11% IR, consisting of a 10% rating from the Diagnosis-Related Estimate (DRE) Lumbosacral Category III and a 1% lower extremity rating for a partial medial meniscectomy. The claimant contested the 11% rating and the Commission sent the designated doctor a letter of clarification. In his November 23, 2003, response to the Commission, the designated doctor changed the claimant's IR to 23%. In doing so the designated doctor stated the following:

[The treating doctor] goes on to agree with my 10% whole person [IR] of the lumbar spine. However, [the treating doctor] also is probably aware of [Commission] Advisory 2003-10, which has now indicated that if a patient has a multi-level fusion of the lumbar spine and who does not have pre-surgical x-rays documenting loss of spinal segment integrity automatically qualifies now for [DRE] IV, and therefore her [IR] for the lumbar spine should be advanced to DRE Lumbarsacral Category IV and a 20% [IR] opined. Therefore, the examinee should be assigned a 20% impairment

of the lumbar spine for her two level fusion which is combined with 4% impairment for the knee yielding a 23% [IR]. [Emphasis added.]

A second letter of clarification was sent by the Commission and on March 5, 2004, the designated doctor responded indicating if the AMA Guides were applied, the claimant's lumbar IR would be 10%, but due to Commission Advisory 2003-10, signed July 25, 2003, and Advisory 2003-10B signed February 24, 2004, his 20% lumbar IR stands.

The Appeals Panel has previously held that it does not have the authority to overrule the Commission advisories in question. Texas Workers' Compensation Commission Appeal No. 031441, decided July 23, 2003. The two Commission advisories are consistent and Commission Advisory 2003-10B provides in pertinent part:

To further clarify this advisory, additional language has been added in Section (2)(c). In applying the 4th Edition of the AMA Guides in the assignment of impairment ratings, health care providers **may wish to consider the following input from the Commission's Medical Advisor:**

* * * *

2. Clarification of Rating for Spinal Fusion(s).

For spinal fusion, the impairment rating is determined by the preoperative x-ray tests for "motion segment integrity" (page 102, 4th Edition of the Guides to the Evaluation of Permanent Impairment). If preoperative x-rays were not performed, the rating may be determined using the following criteria:

* * * *

- b. Multilevel fusion meets the criteria for DRE Category IV, Structural Inclusions, as this multilevel fusion is equivalent to "multilevel spine segment structural compromise" per DRE IV. [Emphasis added.]

Under these Commission advisories, a certifying doctor has the option to assign an IR based on DRE Category IV to an injured employee with a multilevel fusion. Rather than stripping the certifying doctor of the ability to exercise his or her independent medical judgment in assigning an appropriate IR in each individual case, the two Commission advisories merely give the certifying doctor this additional option.

Although these Commission advisories do not require the assignment of an impairment rating based on DRE Category IV if there is a multilevel spinal fusion, the Commission advisories must be considered as part of the certifying doctor's process in

determining the appropriate IR. Also, an IR based on DRE Category IV for a multilevel spinal fusion may not be assigned if flexion and extension comparison x-rays were taken, prior to the surgery, that would show whether there was spinal loss of motion segment integrity as described in the AMA Guides at pg. 3/98 and 99. See Texas Workers' Compensation Commission Appeal No. 041429-s, decided August 4, 2004, and Texas Workers' Compensation Commission Appeal No. 040489, decided April 26, 2004. To the extent language in prior decisions, such as Texas Workers' Compensation Commission Appeal No. 032399-s, decided November 3, 2003, and Appeal No. 040489, *supra*, can be interpreted to require doctors to assign an IR for a multilevel spinal fusion based on DRE Category IV, that interpretation is incorrect and rejected.

Finding sufficient evidence to support the hearing officer's decision and order, and having found no legal error, the hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **ASSOCIATION CASUALTY INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**HAROLD FISHER, PRESIDENT
3420 EXECUTIVE CENTER DRIVE, SUITE 200
AUSTIN, TEXAS 78731.**

Daniel R. Barry
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Gary L. Kilgore
Appeals Judge